

# **EXHIBIT B**



**HAGENS BERMAN LLP**  
*Attorneys at Law*

CAMBRIDGE LOS ANGELES PHOENIX [PLC] SEATTLE

hagens-berman.com  
1301 FIFTH AVENUE, SUITE 2900 • SEATTLE, WA 98101  
(206) 623-7292 • FAX (206) 623-0594

STEVE W. BERMAN  
(206) 224-9320  
[steve@hagens-berman.com](mailto:steve@hagens-berman.com)

June 10, 2004

*Via Facsimile*

Mr. John T. Montgomery  
Ropes & Gray LLP  
One International Place  
Boston, MA 02110-2624

Mr. Erik Haas  
Patterson, Belknap, Webb & Tyler  
1133 Avenue of the Americas  
New York, NY 10036-6710

Mr. Steven M. Edwards  
Mr. Lyndon M. Tretter  
Hogan & Hartson LLP  
875 Third Avenue  
New York, NY 10022

Mr. Frederick G. Herold  
Dechert Price & Rhoads  
1717 Arch Street  
4000 Bell Atlantic Tower  
Philadelphia, PA 19103

Mr. D. Scott Wise  
Davis Polk & Wardwell  
450 Lexington Ave  
New York, NY 10017

Re: In re Average Wholesale Pharmaceuticals Pricing Litigation  
MDL No. 1456

Dear Counsel:

Co-lead counsel and the team leaders as to each of the fast-track defendants have conferred and believe the urgency of the lack of discovery from Schering-Plough, BMS and AstraZeneca warrants this letter.

We are thus writing again regarding our concerns over the timing of the fast-track defendants' compliance with paragraph 4 of CMO No. 10, in responding to Plaintiffs' Omnibus Requests for Production and Interrogatories ("Responses"). As you know, and as we have reminded some of you in letters that have gone unanswered, paragraph 4 requires that "[a] responding party to an initial document request shall complete production of all documents within sixty (60) days of service of such



June 10, 2004  
Page 2

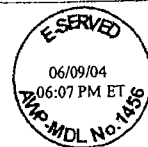
request.” While we understand that we have been engaged in meet and confers, the pace and quality of the production may not be in compliance with CMO No. 10 and may fail to at least comply with the spirit, if not the letter, of the Court’s Order.

We have had several seemingly meaningful dialogues regarding production with each of you. Despite the fact that paragraph 4 of CMO 10 requires that “undisputed documents shall be produced within 60 days” a great many such documents have not been produced, and certainly based upon our review to date it looks as if documents from key sources have not been produced as to AstraZeneca, BMS, Schering-Plough and perhaps other fast-track defendants as well.

Unfortunately, our good faith in relaxing the 60-day period has in many cases been taken advantage of. For at least three defendants, we have received to date a dump of largely worthless or low-priority documents. To paraphrase a letter we found in the BMS production from the California Attorney General on the same issue, about 5% of the production was meaningful, the rest either repetitive or of little or no value. Meanwhile, we have not received electronic data for many drugs, we have not received any documents whatsoever for many drugs, we have not received marketing plans, sales team meeting plans or documents where selling strategies are discussed, documents from the key persons involved in pricing, or any field sales material.

At the same time, while our deadline fast approaches, some of you have no problem in devoting resources to your needs. It appears for example that BMS has at least three, if not more, lawyers daily churning out subpoenas, and demands from plaintiffs or third parties, while BMS is unable to produce documents to plaintiffs on a timely basis. The same is true for AstraZeneca.

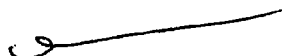
The foregoing is unacceptable and, in our view, a serious breach of Judge Saris’ order. Unless we receive from each of you, by the close of business Monday, a specific and detailed plan outlining how and when production will be completed, and the specifics of what material will be produced and when, we intend to seek emergency relief from the court, including a possible contempt order. You should also include dates for any outstanding 30(b)(6) witnesses.



June 10, 2004  
Page 3

This delay results in our being forced to take depositions in aid of class certification in July and August. We will not be in a position to be tolerant of the vacation excuse so please plan accordingly.

Sincerely,



Steve W. Berman

SWB:dls

cc: All Counsel of Record (via Verilaw)

# **EXHIBIT C**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

_____	)	
IN RE PHARMACEUTICAL INDUSTRY	)	
AVERAGE WHOLESALE PRICE	)	MDL No. 1456
LITIGATION	)	Civil No.: 01-CV-12257-PBS
_____	)	
	)	
THIS DOCUMENT RELATES TO THE	)	Hon. Patti B. Saris
AMENDED MASTER CONSOLIDATED	)	
CLASS ACTION	)	
_____	)	

DECLARATION OF STEVEN F. BARLEY

I, Steven F. Barley, hereby declare that:

1. I am a partner in the Baltimore, Maryland office of Hogan & Hartson, LLP, and am co-lead counsel for defendant Amgen Inc. ("Amgen") in this litigation. In that capacity, I have been personally involved in discussions with plaintiffs' counsel regarding discovery over the course of these and other cases, including a case filed in Arizona state court, captioned *Swanston v. TAP Pharmaceutical Products, Inc., et al.*

2. Attached hereto are true and accurate copies of correspondence between me and Terri Anne Benedetto, an attorney with the law firm of Kline & Specter in Philadelphia, PA. Ms. Benedetto, along with Donald Haviland, represent plaintiffs in the *Swanston* litigation.

3. Over the course of December 2004 and January 2005, I was involved in a series of meet and confers with Ms. Benedetto in an effort to discuss

the scope and timing of Amgen's review and production of documents in the *Swanston* case. I made clear during the course of those discussions, consistent with the Arizona state court's designation of the *Swanston* case as a coordinated case with the MDL litigation, that Amgen's primary concern was to coordinate its review and production efforts among the cases.

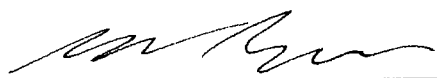
4. On or about January 31, 2005, I received a letter from Ms. Benedetto, in which Ms. Benedetto stated her understanding that Amgen was refusing to produce documents in that case. In a series of letters over the next several weeks (several of which Ms. Benedetto claimed never to have received, notwithstanding fax confirmations regarding receipt), I repeatedly made clear that Amgen was willing to produce documents in that case.

5. More specifically, by letters dated January 31, 2005, February 2, 2005, and February 16, 2005, I made clear that, subject to a further meet and confer, Amgen did intend to produce documents responsive to the *Swanston* plaintiffs' pending requests. Copies of these letters are collectively attached hereto as Attachment 1. Moreover, I specifically advised Ms. Benedetto that Amgen had not yet produced documents in the MDL, and that the anticipated production in the Arizona case, consistent with the state court's designation of that case as a coordinated action, would be "of a scope and at a pace consistent with any production in the MDL." See Attachment 1 (Letter dated February 2, 2005, from Steven F. Barley to TerriAnne Benedetto).

6. At the same time, Amgen was making a concerted effort to meet with plaintiffs' counsel in the MDL proceeding so that it could conduct a single review of potentially responsive documents, rather than undertake the enormous expense of repeated reviews. However, efforts in this regard were delayed until mid-March 2005, and Amgen did not receive plaintiffs' narrowed list of discovery requests in the MDL proceeding until May 26, 2005.

7. To date, Amgen has not made any production of documents in the *Swanston* litigation. This is as a result of a stay of all proceedings entered in that matter at the plaintiffs' request, only weeks after my last communication to plaintiffs' counsel on February 16, 2005. Specifically, on or about March 4, 2005, plaintiffs' filed a motion with the Arizona state court seeking to stay that case. The motion was granted on March 10, 2005, and the case remains stayed as of this date.

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on November 7, 2005.

  
\_\_\_\_\_  
Steven F. Barley



# **ATTACHMENT 1**

HOGAN & HARTSON  
L.L.P.

111 SOUTH CALVERT STREET, SUITE 1600

BALTIMORE, MARYLAND 21202

TEL (410) 659-2700

FAX (410) 599-6981

WWW.HHLAW.COM

STEVEN F. BARLEY  
PARTNER  
(410) 659-2724  
SFBARLEY@HHLAW.COM

January 31, 2005

VIA FACSIMILE (215) 735-0957

TerriAnne Benedetto, Esquire  
Kline & Specter  
The Nineteenth Floor  
1525 Locust Street  
Philadelphia, PA 19102

Re: *Swanston v. TAP Pharmaceutical Products, Inc., et al.*

Dear TerriAnne:

I am in receipt of your letter of earlier today. As you point out, when we last spoke concerning the document production requests, we had agreed to await Judge Albrecht's ruling on the motion to designate the case as a coordinated state case before deciding how to proceed. I understood from our conversations that you would be contacting us following a ruling by Judge Albrecht and we have been waiting to hear from you.

We are willing to produce documents to the plaintiffs in this case. I will give you a call later today or tomorrow to discuss the scope and timing of the production.

Very truly yours,



Steven F. Barley

SFB:jvd

cc: Joseph H. Young, Esquire  
Andrew S. Gordon, Esquire

WASHINGTON, DC

\\BA-34372\0087-185940-11  
NEW YORK BALTIMORE MCLEAN MIAMI DENVER BOULDER COLORADO SPRINGS LOS ANGELES  
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L.L.P.

STEVEN F. BARLEY  
PARTNER  
(410) 659-2724  
SFBARLEY@HHLAW.COM

February 2, 2005

111 SOUTH CALVERT STREET, SUITE 1600  
BALTIMORE, MARYLAND 21202  
TEL (410) 659-2700  
FAX (410) 539-6981  
WWW.HHLAW.COM

**VIA FACSIMILE (215) 735-0957**

TerriAnne Benedetto, Esquire  
Kline & Specter  
The Nineteenth Floor  
1525 Locust Street  
Philadelphia, PA 19102

Re: *Swanston v. TAP Pharmaceutical Products, Inc., et al.*

Dear TerriAnne:

I am in receipt of your letter of earlier today and, quite frankly, am baffled by it.

In your letter, you indicate that Amgen refuses to produce any documents. This is simply incorrect. My letter to you of two days ago clearly states that Amgen is "willing to produce documents to the plaintiffs in this case." I do not see how we could make it more clear that Amgen is willing to produce documents.

Your letter further indicates that you believe further conference calls would not be fruitful since we have had previous discussions about a document production. You may recall that these discussions occurred before Judge Albrecht's ruling that this case be coordinated with the MDL. Indeed, in those prior discussions, both sides agreed that we would have further discussions about discovery following the Court's ruling. Our call yesterday was designed to set up a call to do precisely that. As I pointed out in my letter of January 31, the purpose of the call is to discuss the "scope and timing" of Amgen's anticipated document production, not whether there will be a production.<sup>1/</sup>

---

<sup>1/</sup> You also state that the parties are not required to "discuss discovery matters *ad nauseam*" before concluding that they cannot resolve a discovery dispute. I will remind you that we have had only two substantive conversations regarding Amgen's document production, both of which occurred before Judge Albrecht's ruling.

HOGAN & HARTSON L.L.P.

TerriAnne Benedetto, Esquire

February 2, 2005

Page 2

Your apparent unwillingness to have such a conversation is surprising, not in keeping with the letter or spirit of the discovery rules and, perhaps most importantly, prevents us from providing a document production to you that has been agreed upon by the parties.

We remain open to discussing the scope and timing of Amgen's document production. Absent such a call, we fail to understand what good faith basis you might conceivably have for seeking relief from the Court.

Please feel free to give me or Hank Young a call at your earliest convenience should you choose to reconsider your position. We would like to coordinate Amgen's document production but unfortunately cannot do so without such a call, leaving us with no choice but to unilaterally determine the scope and timing of that production.<sup>2/</sup>

Very truly yours,



Steven F. Barley

SFB:jvd

cc: Joseph H. Young, Esquire  
Andrew S. Gordon, Esquire

---

<sup>2/</sup> Since we have not produced any documents in the MDL and since coordination is optimal, we anticipate that our production will be of a scope and at a pace consistent with any production in the MDL.

HOGAN & HARTSON  
L.L.P.

STEVEN F. BARLEY  
PARTNER  
(410) 659-2724  
SFBARLEY@HHLAW.COM

February 3, 2005

111 SOUTH CALVERT STREET, SUITE 1600  
BALTIMORE, MARYLAND 21202  
TEL (410) 659-2700  
FAX (410) 539-6981  
WWW.HHLAW.COM

*VIA FACSIMILE (215) 735-0957*

TerriAnne Benedetto, Esquire  
Kline & Specter  
The Nineteenth Floor  
1525 Locust Street  
Philadelphia, PA 19102

Re: *Swanston v. TAP Pharmaceutical Products, Inc., et al.*

Dear TerriAnne:

I am in receipt of your letter of earlier today. Accordingly, I am forwarding to you a copy of my January 31, 2005 letter together with a fax confirmation sheet confirming its receipt by your office.

Very truly yours,



Steven F. Barley

SFB:jvd

cc: Joseph H. Young, Esquire  
Andrew S. Gordon, Esquire

WASHINGTON, DC

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Job number : 345

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**IMPORTANT NOTICE**  
**TELECOPY/FACSIMILE COVER LETTER**

TO: TerriAnne Benedetto, Esquire  
 FROM: Steven F. Barley, Esquire  
 TOTAL NO. OF PAGES, INCLUDING COVER: 4

DATE: 2/3/05

TIME: \_\_\_\_\_

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**SAGE:**

cc: Andrew S. Gordon, Esquire  
 Joseph H. Young, Esquire

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 ATTORNEY BILLING NUMBER: \_\_\_\_\_  
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HOGAN & HARTSON  
LLP.

STEVEN F. BARLEY  
PARTNER  
(410) 659-2724  
SFBARLEY@HHLAW.COM

January 31, 2005

111 SOUTH CALVERT STREET, SUITE 1600  
BALTIMORE, MARYLAND 21202  
TEL (410) 659-2700  
FAX (410) 539-6981  
WWW.HHLAW.COM

**VIA FACSIMILE (215) 735-0957**

TerriAnne Benedetto, Esquire  
Kline & Specter  
The Nineteenth Floor  
1525 Locust Street  
Philadelphia, PA 19102

Re: *Swanston v. TAP Pharmaceutical Products, Inc., et al.*

Dear TerriAnne:

I am in receipt of your letter of earlier today. As you point out, when we last spoke concerning the document production requests, we had agreed to await Judge Albrecht's ruling on the motion to designate the case as a coordinated state case before deciding how to proceed. I understood from our conversations that you would be contacting us following a ruling by Judge Albrecht and we have been waiting to hear from you.

We are willing to produce documents to the plaintiffs in this case. I will give you a call later today or tomorrow to discuss the scope and timing of the production.

Very truly yours,



Steven F. Barley

SFB:jvd

cc: Joseph H. Young, Esquire  
Andrew S. Gordon, Esquire

WASHINGTON, DC

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**IMPORTANT NOTICE**  
**TELECOPY/FACSIMILE COVER LETTER**

TO: TerriAnne Benedetto, Esquire  
 FROM: Steven F. Barley, Esquire  
 TOTAL NO. OF PAGES, INCLUDING COVER: 2

DATE: 1/31/2005TIME: 1:18:05 PM

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**AGENTS:**

Andrew S. Gordon, Esquire  
 Joseph H. Young, Esquire

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 ATTORNEY BILLING NUMBER: \_\_\_\_\_  
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HOGAN & HARTSON  
L.L.P.

STEVEN F. BARLEY  
PARTNER  
(410) 659-2724  
SFBARLEY@HHLAW.COM

February 16, 2005

111 SOUTH CALVERT STREET, SUITE 1600  
BALTIMORE, MARYLAND 21202  
TEL (410) 659-2700  
FAX (410) 539-6981  
WWW.HHLAW.COM

**VIA FIRST CLASS MAIL, FEDEX,  
EMAIL AND FACSIMILE (215) 735-0957**

TerriAnne Benedetto, Esquire  
Kline & Specter  
The Nineteenth Floor  
1525 Locust Street  
Philadelphia, PA 19102

Re: *Swanston v. TAP Pharmaceutical Products, Inc., et al.*

Dear Ms. Benedetto:

I am in receipt of your letter of earlier today in which you claim that you "still have not received a copy of any letter from [me] dated January 31, 2005." As you have requested, I enclose my letter dated January 31, 2005 and the attached facsimile confirmation sheet showing receipt by your office on that date.

As you are aware, you had written to me on February 3, 2005 requesting a copy of the January 31, 2005 letter. I enclose a copy of a letter dated February 3, 2005, enclosing the January 31, 2005 letter, together with a facsimile confirmation sheet showing receipt by your office on February 3, 2005.

We have experienced considerable problems with faxes to and from your office since the onset of this litigation. Accordingly, I have taken the liberty of sending this letter, together with all enclosures, to you via email, regular mail, FedEx and facsimile to ensure receipt. Please confirm that you have received this letter.

Very truly yours,



Steven F. Barley

SFB:jvd

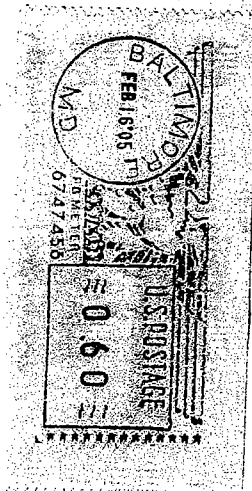
cc: Joseph H. Young, Esquire  
Andrew S. Gordon, Esquire

WASHINGTON, DC

\\BA-58360\0087-180794\HOGAN & HARTSON MUNICH BRUSSELS LONDON PARIS BUDAPEST PRAGUE WARSAW MOSCOW BEIJING TOKYO  
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HOGAN & HARTSON L.L.P.  
*Barley*  
111 SOUTH CALVERT STREET, SUITE 1600  
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Kline & Specter  
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Extremely Urgent

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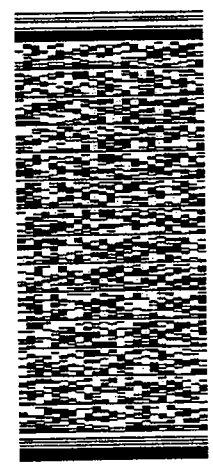
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Suite 1600  
Baltimore, MD 21202



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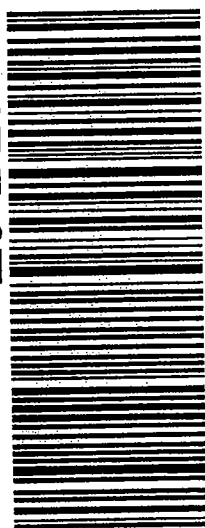
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Page 1 of 1

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 Suite 1600  
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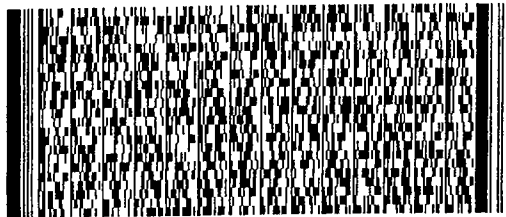
SHIP TO: (215)772-1000 BILL SENDER  
**TerriAnne Benedetto, Esquire**  
**Kline & Specter, P.C.**  
**1525 Locust Street**  
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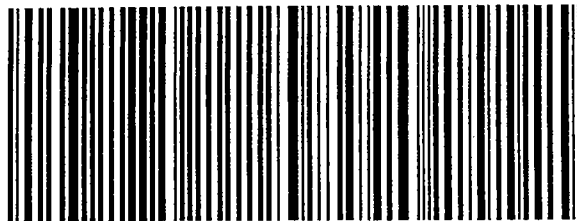
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TO: TerriAnne Benedetto, EsquireDATE: 2/16/2005FROM: Steven F. Barley, EsquireTIME: 2:31:14 PMTOTAL NO. OF PAGES, INCLUDING COVER: 6

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**MESSAGE:**

Cc: Andrew S. Gordon, Esquire  
 Joseph H. Young, Esquire

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